Syllabus.

GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA, *v.* AMERICAN PRESS CO., INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 303. Argued January 14, 1936.—Decided February 10, 1936.

1. As respects the amount in controversy, the District Court has jurisdiction of a suit where the requisite value is involved as to each of several plaintiffs though not involved as to others. P. 241.
2. A motion to dismiss the whole case because the amount in controversy as to some of the plaintiffs is too small, should be overruled. *Id.*
3. There is equitable jurisdiction to enjoin collection of an allegedly unconstitutional state tax, where the taxpayer, if he pays, is afforded no clear remedy of restitution. P. 242.
4. Liberty of the press is a fundamental right protected against state aggression by the due process clause of the Fourteenth Amendment. P. 242.
5. The fact that, as regards the Federal Government, the protection of this right is not left to the due process clause of the Fifth Amendment but is guaranteed *in specie* by the First Amendment, is not a sufficient reason for excluding it from the due process clause of the Fourteenth Amendment. P. 243.
6. A corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. P. 244.
7. A State license tax (La. Act No. 23, July 12, 1934) imposed on the owners of newspapers for the privilege of selling or charging for the advertising therein, and measured by a percent. of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than 20,000 copies per week, *held* unconstitutional. P. 244.
8. From the history of the subject it is plain that the English rule restricting freedom of the press to immunity from censorship before publication was not accepted by the American Colonists, and that the First Amendment was aimed at any form of previous restraint upon printed publications or their circulation, including restraint by taxation of newspapers and their advertising, which were well-known and odious methods still used in England when the First Amendment was adopted. P. 245.

9. The predominant purpose of the grant of immunity was to preserve an untrammeled press as a vital source of public information. P. 250.

10. Construction of a constitutional provision phrased in terms of the common law, is not determined by rules of the common law which had been rejected in this country as unsuited to local civil or political conditions. P. 248.

It is not intended in this case to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of Government. The tax in question is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press. The manner of its use in this case is in itself suspicious; it is not measured or limited by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

10 F. Supp. 161, affirmed.

APPEAL from a decree permanently enjoining the enforcement of a state tax on newspapers.

Mr. Charles J. Rivet, with whom *Mr. Gaston L. Porterie,* Attorney General of Louisiana, was on the brief, for appellant.

There is lack of jurisdiction.

The value of the disputed tax alone is the amount in controversy. *Healy* v. *Ratta,* 292 U. S. 263.

The tax in controversy must equal the jurisdictional sum as to each complainant. *Scott* v. *Frazier,* 253 U. S. 243; *Pinel* v. *Pinel,* 240 U. S. 594; *Cole* v. *Norborne Land Drainage District,* 270 U. S. 45; *Di Giovanni* v. *Camden Fire Insurance Assn.,* 296 U. S. 64.

The averments of the bill present no real and substantial federal question.

The statute assailed as unconstitutional furnished no means of action to the Supervisor of Public Accounts, charged with its enforcement, other than the institution of a suit in a court of competent jurisdiction, where

every objection of law and fact would be open to the defendant in such suit.

The statute does not provide for a lien against property, nor for summary seizure thereof, nor for interference with the business by injunction, or otherwise; and no execution is permitted except such as would result from any other final judgment of the state court.

No great or irreparable injury can be asserted when the only possible complaint is that a law suit in the state court may result unfavorably to the complainants.

Sections 5 and 11 of the Act may be fairly construed to mean that where a tax is paid under protest no remittance is to be made to the State Treasurer until judicial determination of liability.

The First Amendment of the Federal Constitution imposes no restriction upon the States with reference to abridging the freedom of speech or of the press.

The theory that by effect of the Fourteenth Amendment legislatures of the States are prohibited from passing laws infringing the freedom of the press, finds no support in the jurisprudence of this Court. 1 Cooley's Const. Lim., 8th ed., p. 67, note.

The effect of the second clause of the Fourteenth Amendment was to protect from the hostile legislation of the States, the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the States. To establish a clear and comprehensive definition of this citizenship, the first clause of the Fourteenth Amendment declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizen of the United States." See *Slaughter House Cases*, 16 Wall. 36.

The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not of artificial persons. *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359. The appellees are cor-

porations. They do not possess the privileges and immunities of citizens of the United States within the meaning of the Constitution. *Liberty Warehouse Co.* v. *Tobacco Growers Assn.*, 276 U. S. 71.

A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State. *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112.

There is nothing contrary to this in *Near* v. *Minnesota*, 283 U. S. 697; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Fiske* v. *Kansas*, 274 U. S. 380; *Powell* v. *Alabama*, 287 U. S. 45.

Nor will it do to say that because the stockholders of these corporations are citizens of the United States the corporations must be considered as such. Cf. *Bank of Augusta* v. *Earle*, 13 Pet. 519.

Furthermore, as pointed out in *Near* v. *Minnesota*, *supra*, the chief purpose of the constitutional protection of liberty of the press is to prevent previous restraints upon publications.

Nowhere has it ever been held that a person or corporation engaged in the publishing business is exempt from taxation. The following authorities are to the contrary: *In re Jaeger*, 29 S. C. 438 (license taxes); *Norfolk* v. *Norfolk Landmark Publishing Co.*, 95 Va. 564 (license taxes); The Federalist, p. 632.

If freedom of the press implied freedom from taxation, the income tax law of the United States, which takes a part of every penny collected as income from the business of publishing a newspaper, would be clearly unconstitutional.

The tax is not an occupational license tax on the business of publishing newspapers. The legislature could have levied such a tax, but it did not do so. It imposed

the tax on the business "of selling, or making any charge for, advertising or for advertisements."

It is not essential to liberty of speech and freedom of the press, as constitutionally understood, that profit be derived from the exercise of these rights. Nor was it ever contemplated that the constitutional guarantee should extend to charging for and selling advertising.

In fact, the constitutional guarantee is limited to the right of the citizen to speak and publish his views, subject to punishment for the abuse of that privilege. Liberty of speech and of the press is not an absolute right. *Near* v. *Minnesota,* 283 U. S. 697.

Appellees rely also upon § 3 of Art. 1 of the Constitution of Louisiana. The highest court of Louisiana has already construed that provision as not affording an exemption from taxation. *New Orleans* v. *Crescent Newspaper,* 14 La. Ann. 804.

The state statute does not censure or restrict the free expression of opinions. It merely requires of those who engage in the profitable business of making others pay for the expression of their views, or for advertising their business, a small contribution for the support of government.

There was no denial of equal protection.

Messrs. Esmond Phelps and *Elisha Hanson,* with whom *Messrs. Bennett C. Clark, J. J. Davidson, Jr., Eberhard P. Deutsch, Ben B. Taylor,* and *John H. Tucker, Jr.,* were on the brief, for appellees.

The District Court had jurisdiction to determine the questions presented.

The case presented called for the exercise of jurisdiction by a court of equity.

The statute violates the provisions of § 8 of Art. X of the Constitution of Louisiana of 1921, which requires that license taxes must be levied on all persons engaged in the trade, business, occupation, vocation or profession upon which a license tax is imposed.

The Act denies appellees the equal protection of the laws.

The Act violates the provisions of the Constitution of Louisiana and of the Constitution of the United States guaranteeing freedom of the press.

The constitutional guaranties against abridgment of the freedom of the press were intended to prohibit every form of abridgment conceivable in the minds of hostile legislatures.

The Act provides for a licensing of the press and a payment of a gross receipts tax on that portion of the revenues of the press derived from the sale and publication of advertising. Further, the Act is limited in its applicability to but thirteen newspapers out of a total of 163 in the State, of which thirteen newspapers twelve were active in their opposition to the dominant political group in the State, which group controlled the Legislature and at whose dictates the Legislature passed this law.

Among the efforts to restrain the press with which the framers of the Constitution were familiar were licensing, censorship, taxation, writs of attachment, seditious libel and injunction proceedings. Taxation as a form of restraint was as well known and particularly obnoxious to our forefathers. The historical background of the First Amendment was fully discussed by this Court in its decision in *Near* v. *Minnesota,* 283 U. S. 697.

Not only the First Amendment, but the Fourth and Fifth grew out of the knowledge of our constitution-makers of efforts to control the press, which, if successful, would make it easy for dictators to control their subjects. See *Boyd* v. *United States,* 116 U. S. 616.

See American Debates by Marion Mills Miller, Vol. 1, p. 20; John Lennox and the Taxes on Knowledge, William Stewart, p. 8, as to application of the Stamp Tax, 1765, to newspapers in the Colonies.

At the outbreak of the War for Independence and at the time of the adoption of the Constitution, there were stamp taxes on the circulation and taxes on the advertising matter of English newspapers. The circulation tax became effective in 1712 and it was not repealed until 1855. The advertising tax became effective in 1712 and was abolished in 1853. James Paterson, The Liberty of the Press, London, 1880, pp. 56–58.

During the debates on the ratification of the Constitution, one of the burning issues before the public was the failure of the constitutional convention to include in the body of the document a so-called bill of rights including a guaranty of a free press. Richard Henry Lee, Eleazer Oswald, Melancthon Smith, and other patriots in the debates over ratification specifically assailed the Convention for failing to include a free press provision which would prohibit suppression of the press by taxation.

Since the ratification of the Fourteenth Amendment, the guaranty of free press expressed in the First Amendment, is binding upon state legislatures as well. *Near* v. *Minnesota, supra; Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357.

The power to tax the press is the power to destroy it.

One of the purposes of this tax was to divert business from newspapers having a circulation of more than 20,000 per week to newspapers with less circulation.

The levy is a direct tax upon the newspaper publishing business. Its effect is immediate, direct and punitive. Cf. *Brown* v. *Maryland,* 12 Wheat. 419; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Ex parte Harrison,* 212 Mo. 88.

A tax on the principal source of revenue of a newspaper is a tax upon its subsistence. *Evans* v. *Gore,* 253 U. S. 245.

An attempt to tax the press over a certain size is a direct violation of this provision. The record shows that circulation is but one of many factors affecting advertis-

ing. The volume of a newspaper's circulation certainly has but a remote bearing on its revenues from advertising, if any at all.

Even were the law so phrased as to levy the tax by reference to the volume of advertising instead of the volume of circulation, it would be invalid.

The fact that these appellees are corporations does not deprive them of the right to resist an attempt to abridge the freedom of the press. *Home Insurance Co.* v. *New York*, 134 U. S. 594.

This Court has the power to ascertain the nature and effect of this Act, irrespective of its designation or declared purpose.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This suit was brought by appellees, nine publishers of newspapers in the State of Louisiana, to enjoin the enforcement against them of the provisions of § 1 of the act of the legislature of Louisiana known as Act No. 23, passed and approved July 12, 1934, as follows:

"That every person, firm, association, or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business."

The nine publishers who brought the suit publish thirteen newspapers; and these thirteen publications are the

only ones within the State of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of "slightly less than 20,000 copies per week" which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

The act requires everyone subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in § 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the act subjects itself to the payment of $500 to be recovered by suit. All of the appellees are corporations. The lower court entered a decree for appellees and granted a permanent injunction. 10 F. Supp. 161.

First. Appellant assails the federal jurisdiction of the court below on the ground that the matter in controversy does not exceed the sum or value of $3,000, as required by par. 1 of § 24 of the Judicial Code. The case arises under the Federal Constitution; and the bill alleges, and the record shows, that the requisite amount is involved in respect of each of six of the nine appellees. This is enough to sustain the jurisdiction of the district court. The motion was to dismiss the bill—that is to say, the bill in its entirety—and in that form it was properly denied. No motion to dismiss was made or considered

by the lower court as to the three appellees in respect of whom the jurisdictional amount was insufficient, and that question, therefore, is not before us. *The Rio Grande,* 19 Wall. 178, 189; *Gibson* v. *Shufeldt,* 122 U. S. 27, 32.

Second. The objection also is made that the bill does not make a case for equitable relief. But the objection is clearly without merit. As pointed out in *Ohio Oil Co.* v. *Conway,* 279 U. S. 813, 815, the laws of Louisiana afford no remedy whereby restitution of taxes and property exacted may be enforced, even where payment has been made under both protest and compulsion. It is true that the present act contains a provision (§ 5) to the effect that where it is established to the satisfaction of the Supervisor of Public Accounts of the state that any payment has been made under the act which was "not due and collectible," the Supervisor is authorized to refund the amount out of any funds on hand collected by virtue of the act and not remitted to the state treasurer according to law. It seems clear that this refers only to a payment not due and collectible within the terms of the act, and does not authorize a refund on the ground that the act is invalid. Moreover, the act allows the Supervisor to make remittances immediately to the state treasurer of taxes paid under the act, and requires him to do so not later than the 30th day after the last day of the preceding quarter; in which event the right to a refund, if not sooner exercised, would be lost. Whether an aggrieved taxpayer may obtain relief under § 5 is, at best, a matter of speculation. In no view can it properly be said that there exists a plain, adequate and complete remedy at law. *Davis* v. *Wakelee,* 156 U. S. 680, 688; *Union Pacific R. Co.* v. *Weld County,* 247 U. S. 282, 285.

Third. The validity of the act is assailed as violating the Federal Constitution in two particulars—(1) that it abridges the freedom of the press in contravention of the due process clause contained in § 1 of the Fourteenth

Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same Amendment.

1. The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

In the case of *Hurtado* v. *California,* 110 U. S. 516, this Court held that the term "due process of law" does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term "due process of law" did not, *ex vi termini,* include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. But in *Powell* v. *Alabama,* 287 U. S. 45, 65, 68, we held that in the light of subsequent decisions the sweeping language of the *Hurtado* case could not be accepted without qualification. We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safe-

guarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this Court beginning with *Gitlow* v. *New York,* 268 U. S. 652, 666, and ending with *Near* v. *Minnesota,* 283 U. S. 697, 707. The word "liberty" contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589.

Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a "citizen" within the meaning of the privileges and immunities clause. *Paul* v. *Virginia,* 8 Wall. 168. But a corporation is a "person" within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 592; *Smyth* v. *Ames,* 169 U. S. 466, 522.

The tax imposed is designated a "license tax for the privilege of engaging in such business"—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct

tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 45, and cases cited), it well might result in destroying both advertising and circulation.

A determination of the question whether the tax is valid in respect of the point now under review, requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert* v. *Louisiana,* 272 U. S. 312, 316), and, as such, is embodied in the concept "due process of law" (*Twining* v. *New Jersey,* 211 U. S. 78, 99), and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. Cf. *Powell* v. *Alabama, supra,* pp. 67–68. The history is a long one; but for present purposes it may be greatly abbreviated.

For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an "Appeal for the Liberty of Unlicensed Printing," assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views "without previous censure"; and declared the impossibility of finding any man base enough to ac-

cept the office of censor and at the same time good enough to be allowed to perform its duties. Collett, History of the Taxes on Knowledge, vol. I, pp. 4–6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (The Struggle for the Freedom of the Press, p. 15), merely "a right or liberty to publish *without* a license what formerly could be published only *with* one." But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8–10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322–327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government; and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

These duties were quite commonly characterized as "taxes on knowledge," a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of

those who defended the act. May (Constitutional History of England, 7th ed., vol. 2, p. 245), after discussing the control by "previous censure," says: ". . . a new restraint was devised in the form of a stamp duty on newspapers and advertisements,—avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time." Collett (vol. I, p. 14), says, "Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers."

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as "taxes on knowledge" sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, "The liberty of opinion keeps governments themselves in due subjection to their

duties." Erskine's Speeches, High's ed., vol. I, p. 525. See May's Constitutional History of England, 7th ed., vol. 2, pp. 238–245.

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136–137.

The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words "freedom of the press" the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that

law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. *Continental Illinois Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 668–669. And, obviously, it is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276–277; *Waring* v. *Clarke*, 5 How. 441, 454–457; *Powell* v. *Alabama, supra*, pp. 60–65.

In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods.

This court had occasion in *Near* v. *Minnesota, supra*, at pp. 713 *et seq.*, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant "principally although not exclusively, immunity from previous restraints or [from] censorship."

Judge Cooley has laid down the test to be applied— "The evils to be prevented were not the censorship of the press merely, but any action of the government by

means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's Constitutional Limitations, 8th ed., p. 886.

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our

national existence has undertaken to impose a tax like that now in question.

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

2. Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned that it also constitutes a denial of the equal protection of the laws.

Decree affirmed.

BORDEN'S FARM PRODUCTS CO., INC. *v.* TEN EYCK, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 597. Argued January 6, 1936.—Decided February 10, 1936.

1. As an incident to a temporary and experimental scheme for assisting the milk industry by fixing prices to producer and consumer (*Nebbia* v. *New York*, 291 U. S. 502), the New York Milk Control Act, as amended, discriminated between dealers who had, and dealers who had not, well-advertised trade names, by permitting the latter to sell bottled milk in the City of New York at a price one cent less per quart than the price prescribed for the former. *Held* that there was a reasonable basis for the discrimination; and that a dealer of the former class, who failed to show that, in practice, the differential had resulted in any gain of trade at its expense by the latter class of dealers, or had caused it substantial loss, did not